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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA, New York, N.Y.
5 v. 22 Cr. 644 (JSR)

6 STEVEN PEREZ, a/k/a "Lucha El",
7 Defendant.
8 -----x

9
10 March 15, 2023
11 2:10 p.m.

12 Before:

13 HON. JED S. RAKOFF,
14 U.S. District Judge

15 APPEARANCES

16 DAMIAN WILLIAMS
17 United States Attorney for the
18 Southern District of New York
BY: LUCAS ISSACHAROFF
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19 FEDERAL DEFENDERS OF NEW YORK
20 Attorneys for Defendant
BY: ZAWADI BAHARANYI
AMANDA J. MAYO

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1 (Case called)

2 THE DEPUTY CLERK: Will everyone please be seated, and
3 will the parties please identify themselves for the record.

4 MR. ISSACHAROFF: Thank you, your Honor. Lucas
5 Issacharoff for the government, joined by my colleagues,
6 Madison Smyser and Ashley Nicholas.

7 MS. BAHARANYI: Good afternoon, your Honor. Zawadi
8 Baharanyi for the Federal Defenders. I am joined by my
9 colleague Amanda Mayo, also at the Federal Defenders. We
10 represent Lucha El, who is seated to my right.

11 THE COURT: So, we are here to, with respect to this
12 defendant, to hear argument on the motions that have been
13 filed. There is both a motion to dismiss and a motion to
14 suppress. Because I have somewhat limited time, I am going to
15 ask counsel not to repeat what is in their briefs, which I have
16 read, but just if there are new arguments they want to make or
17 responses to the other side's arguments that they didn't have
18 the opportunity to yet make, now is the opportunity, starting
19 with, let's take the motion to dismiss first.

20 So, let me hear from moving counsel.

21 MS. BAHARANYI: Yes, your Honor.

22 So, without repeating what the Court is already aware
23 of, I think there are a couple of new and additional points
24 that further weigh in support of our motion to dismiss. I will
25 then take, in turn, the motion to suppress, whenever the Court

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1 wishes to hear that.

2 One of the points that had been raised by the
3 government in its argument is that the conduct in this case was
4 not conduct that was protected by the Second Amendment and one
5 of the cases that the government relies on heavily is *Decastro*,
6 which was discussed in the papers. What I did not include in
7 our response, our reply last week but what I would like to
8 address now, is *Decastro* does implicitly concede and recognize
9 that 922(a)(3), the statute here, does put some burden, does
10 implicate someone's Second Amendment rights. In *Decastro*, the
11 analysis was whether there was a heavy or significant or
12 substantial burden, but the Second Circuit at least made this
13 implicit understanding that there was some implication on
14 someone's right to bear and possess arms based on 922(a)(3).

15 Now, because of *Bruen*, which obviously has now upended
16 *Decastro* and its reasoning, we know that the analysis, the
17 determination of whether there is a heavy burden or significant
18 impact on someone's right to bear arms versus a governmental
19 interest is no longer the correct inquiry. The correct inquiry
20 is, one, whether this conduct does in fact implicate the Second
21 Amendment, is his conduct in this case, which is receiving and
22 possessing a firearm, covered by the Second Amendment, and even
23 *Decastro* recognizes that this Court must say yes.

24 THE COURT: Let me ask you this. Your client is not
25 charged with unlawful possession, he is charged with unlawful

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1 transportation.

2 MS. BAHARANYI: Your Honor, he --

3 THE COURT: Go ahead.

4 MS. BAHARANYI: He is charged with receiving, and
5 receiving --

6 THE COURT: Well --

7 MS. BAHARANYI: Receiving into his state residence and
8 that by its --

9 THE COURT: The statute is, yes, he willfully and
10 knowingly transported or received in New York firearms
11 purchased or otherwise obtained out-of-state. Right?

12 MS. BAHARANYI: And that is what the government is
13 saying --

14 THE COURT: So why is that a regulation of gun
15 possession, as you claim, as opposed to a regulation about
16 out-of-state acquisition and transfer?

17 MS. BAHARANYI: Your Honor, in order for them to apply
18 the statute here the government will have to prove that he
19 received and possessed these firearms. That is a necessary --
20 that's what the government also concedes in their own motion,
21 that they are going to prove.

22 THE COURT: But it doesn't stop him if he was
23 otherwise lawfully entitled to go out and buy a gun but that's
24 not what he is being charged with here.

25 MS. BAHARANYI: He is not charged with going -- that's

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1 correct. He is not charged with going out and buying a gun
2 unlawfully, but the charge here does rest on his receipt of a
3 firearm. And I think to the give the court a few more cases
4 that weren't cited in our briefs, there have been a number of
5 District Court opinions on similar 922 statutes that say the
6 receipt, the process of receiving a firearm, necessarily
7 entails possessing it.

8 So, for example, in 18 U.S.C. 922(n) it makes it
9 unlawful for an individual, who is under some form of
10 indictment, to receive a firearm. I have a couple of cases
11 that I will cite to the Court now. *United States v. Quiroz*,
12 2022 WL 4354282, that's a Western District of Texas case from
13 September of last year. It explains that that statute, 922(n),
14 which again governs or is concerned with the receipt of a
15 firearm is unconstitutional because, one, it does entail
16 someone possessing a firearm; and two, there is no historical
17 tradition of that sort of regulation.

18 Similarly, I will give the Court a couple more
19 statutes, case citations if the Court will allow it, *United*
20 *States v. Hicks*, which is a 2023 Western District of Texas case
21 and that case, the citation is another Westlaw case, 2023 WL
22 164170, the Court explicitly opines on whether receiving a
23 firearm under 922(n) necessarily entails someone possessing a
24 firearm and whether that then comes under the gambit of
25 someone's right to bear and possess guns. That Court, as I

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1 believe your Honor should do as well, found that the act of
2 receiving requires someone to possess. And we are talking
3 about the same language here so we are talking about receipt
4 and receiving in the context of someone being under federal
5 document, or receipt and receiving in the context of someone
6 receiving or obtaining a gun from out of state but both have to
7 do with someone's ability to possess a firearm and one -- the
8 receipt -- requires the other -- possession. And in this
9 particular case as well the government has made clear that they
10 intend to prove his guilt in this case by arguing that on two
11 separate occasions he possessed these firearms in June and July
12 of 2021. So, very much so, receipt here has everything to do
13 with Mr. Lucha's ability to possess and his actual possession
14 of these firearms.

15 So that takes us then to the next question, your
16 Honor. If there is any --

17 THE COURT: Let me ask you this. I will look at those
18 cases and thank you for bringing them to my attention. Did you
19 tell your adversary that you were going to cite those cases
20 before today's argument?

21 MS. BAHARANYI: I did not, your Honor, but I can
22 provide them with copies of the cases as well.

23 THE COURT: Well, if they want it I will give them an
24 opportunity to put in a written response, because otherwise
25 they didn't know that you were going to be citing that, but go

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1 ahead.

2 MS. BAHARANYI: Yes. Your Honor, obviously we are
3 happy to --

4 THE COURT: No, I think it is the better practice, if
5 you are going to cite a case that isn't in your briefs, which
6 is not uncommon in these kinds of situations, to give your
7 adversary advance warning, at least a few hours, so the person
8 can take a quick look at it, maybe he has independently, I
9 don't know, he or she, but, if not, I will certainly give them
10 the opportunity to put in a written response since they
11 otherwise would be surprised.

12 Go ahead.

13 MS. BAHARANYI: Understood, your Honor. Those cases
14 are just two examples of cases where the district courts have
15 taken and assessed what "receipt" means and have found it to be
16 conduct that requires possession and falls under the Second
17 Amendment.

18 So then that brings us to the next point, the only
19 other kind of prong in this inquiry since *Bruen*, which is is
20 there any sort of historical tradition of this form of
21 regulation. Now, it is only the government's burden to prove
22 this historical tradition and not history broadly, as I think
23 is made clear in our papers, but did the founding fathers, when
24 they were ratifying the Second Amendment, envision this sort of
25 regulation, this sort of constraint on someone's Second

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1 Amendment rights. And what is missing from the government's
2 brief is any example of a law that is distinctly similar to the
3 law that is being applied against Mr. Lucha here.

4 What is in the government's brief are numerous --
5 well, not quite numerous but a couple of examples of colonial
6 era laws of commercial regulations so of the regulations of the
7 sale or trafficking of firearms. What Mr. Lucha has been
8 charged with is not commercial sale of firearms. He is not
9 charged with gun trafficking either, I think that's a charge
10 that applies solely to his co-defendant. He is charged under
11 922(a)(3) which does prohibit his individual possession of a
12 firearm based off of how it was obtained but he is not someone
13 who has been charged as being engaged in the commercial sale
14 provision of these firearms. And I want to point this out
15 because we did not raise this in our motion, there is a second
16 of 922 that governs the commercial sale of firearms or licensed
17 importers providing firearms to individuals in similar context.

18 So 922(b)(3) says that it is a crime, it is unlawful
19 for someone who is a licensed importer of firearms, to sell or
20 deliver any firearm to any person who the licensee knew, knows,
21 or has reason to believe, does not reside in the state in which
22 the licenses operate. So that is the commercial regulation and
23 if that is what Mr. Lucha had been charged under, your Honor,
24 then the examples provided to the government would be somewhat
25 on point. But that's not at all what he has been charged with

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1 here. So, he is not charged with engaging in the sales, he is
2 charged with his actual -- his possession for receiving and
3 possessing firearms.

4 THE COURT: All right.

5 MS. BAHARANYI: If the government is unable to provide
6 a single distinctly similar statute, which they have been
7 unable to provide, then *Bruen* makes clear the only next step is
8 dismissal because the Second Amendment does cover what his
9 conduct was in this case, because the government has been
10 unable to provide that statute, just one example, your Honor,
11 then that's the only result that is now required under *Bruen*.

12 THE COURT: All right. Thank you very much. Let me
13 hear from the government.

14 MR. ISSACHAROFF: Thank you, your Honor.

15 I want to start with the conduct question that defense
16 counsel began with. So first I just want to clarify that the
17 government is not taking the position that receipt is
18 categorically unprotected under the Second Amendment as
19 distinct from possession. The government acknowledges that
20 receipt is a necessary precursor to possession for ability to
21 keep and bear arms in certain instances. That being said, what
22 distinguishes 922(a)(3), for example, from 922(n) discussed in
23 the *Quiroz* case and I am familiar with that case and don't need
24 the opportunity to provide supplemental briefing but appreciate
25 the Court's consideration.

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1 So, 922(n) states that a person who is under felony
2 indictment cannot transport or receive. That means that it
3 functions as a complete extinguishment of that person's ability
4 to acquire arms for self-defense. That is why 922(n)
5 implicates the Second Amendment, because although it doesn't
6 affect the pre-indictment -- any arms that were already
7 possessed pre-indictment, it does state that a person cannot
8 acquire any arms from any source. 922(a)(3), on the other
9 hand, simply channels the acquisition of arms for lawful
10 self-defense through legitimate channels. As we cited in our
11 brief, there are over 2,000 federal firearms licensees in the
12 State of New York. Presumably these were not only available to
13 the defendant, they were in fact, by far, the most convenient
14 way for him to obtain a firearm rather than have somebody
15 acquire them for him from out of state.

16 So, that is why 922(a)(3) falls within the category
17 recognized by *Heller*, conditions and qualifications on the
18 commercial sale of arms which is a recognized, long-standing
19 regulation that *Heller* and *Bruen*, and the Supreme Court's
20 Second Amendment jurisprudence casts no doubt on --

21 THE COURT: So, just looking at the text of the
22 statute, might it not be read to prohibit a gun owner who is
23 moving regularly between various states but who lawfully
24 required his gun in the initial state of residence from
25 bringing it with him to the new state of residence? If that's

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1 the case would that pre-Second Amendment --

2 MR. ISSACHAROFF: Your Honor, I believe that
3 Section 922(a)(3) includes, it states that: Shall not preclude
4 any person -- I'm sorry. So subsection A of 922(a)(3) talks
5 about inheritance through bequest or intestate succession. So
6 I don't -- I apologize, but I believe the text of 922(a)(3), it
7 states that it discusses transport into or receipt in the state
8 where he resides. So I think that if one lawfully acquired an
9 arm, received that arm while residing within a state and then
10 moved to another state, I'm not certain that 922(a)(3) would
11 prohibit that conduct. Nevertheless, that is not the
12 circumstance that we face here and so considering an as-applied
13 challenge, which we noted in our brief, is the appropriate
14 order.

15 THE COURT: All right.

16 MR. ISSACHAROFF: So then I want to turn briefly to
17 the *Decastro* case. I disagree with defense counsel that
18 *Decastro* does acknowledge that there is a Second Amendment
19 burden imposed by 922(a)(3). *Decastro* rejects heightened
20 scrutiny by noting repeatedly that there is no substantial
21 limitation on the right to acquire arms, noting the ready
22 availability and the greater convenience of arms required
23 through legitimate channels within one state. Now, it may be
24 that an individual is prohibited by, say, New York State's laws
25 from using those channels, but that is not -- this is not the

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1 context in which they made that challenge. They should
2 separately challenge the New York State laws rather than seek
3 to acquire them from out-of-state. The *Decastro* Court does not
4 actually apply any means-end scrutiny. They reject heightened
5 scrutiny and say therefore the challenge must fail. And they
6 do analogize to time place restrictions under the amendment but
7 it is not clear that they do accept the proposition that there
8 is any actual limitation on the right to keep and bear arms in
9 self-defense which is the right as defined by the Supreme Court
10 in *Heller*. There were literally thousands of legitimate
11 channels through which defendant could have acquired arms for
12 self-defense and it simply doesn't restrict those.

13 THE COURT: I'm going to take the liberty of cutting
14 you off because, as I hear the arguments from both sides, I
15 think it would be useful to have some additional brief
16 briefing. So I will allow the government to put in a further
17 brief not to exceed five single-spaced pages addressing both
18 the cases that were first raised here today but also any other
19 issue that was raised here in the argument today, and then I
20 will allow defense counsel to put in a five-page surrebuttal or
21 whatever you want to call it.

22 So, how soon can the government get in its paper? You
23 are talking to the real party in interest I can see.

24 MR. ISSACHAROFF: I was asking how long before we get
25 the transcript but I think that 10 days.

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1 THE COURT: You need 10 days?

2 MR. ISSACHAROFF: A few days to get the transcript so
3 that we can --

4 THE COURT: I am sure your colleague was taking notes
5 of what was said today.

6 MR. ISSACHAROFF: We did, your Honor, but I do want to
7 make sure.

8 THE COURT: You don't think her notes, you are
9 skeptical that her notes are less than complete and accurate?

10 MR. ISSACHAROFF: Of course not, your Honor.

11 THE COURT: All right, 10 days, but I really want to
12 move it along. Then so that would be, let's see, today is the
13 15th, so that would be.

14 MR. ISSACHAROFF: We can do the 20th, your Honor.

15 THE COURT: I'm sorry?

16 MR. ISSACHAROFF: We can do the 20th, next Wednesday.
17 That's fine.

18 THE COURT: The 22nd?

19 MR. ISSACHAROFF: The 22nd, yes.

20 THE COURT: So one week, that sounds better, and one
21 week for the defense so that's the 29th, and I will give you at
22 least a bottom line ruling by no later than the week after that
23 May 5th. I may or may not have a full opinion ready for you by
24 that time but at least you will know where you stand one way or
25 the other.

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1 So, let's turn to the motion to suppress and let me go
2 back to moving counsel.

3 MS. BAHARANYI: Thank you, your Honor.

4 Your Honor, there actually aren't additional points
5 that I need to make beyond what has been provided in both our
6 moving papers and our reply. I would reiterate, though, if the
7 Court does want to consider any part of that Officer 1's
8 observations we would ask for a hearing on that matter.

9 THE COURT: OK. Let me hear what the government says.
10 I won't speak until your colleague is ready to take complete
11 notes.

12 MS. SMYSER: Great. We are ready, your Honor.

13 So I just want to respond briefly to a few points that
14 came up in defense counsel's briefing. One thing that they
15 focus significantly on, I think there are two main issues here,
16 one is whether the 911 call is a reliable indicator that gives
17 the officers reasonable suspicion for the stop.

18 THE COURT: Didn't the person say that she knew Lucha?
19 Did she provide her phone number? Didn't she identify him by
20 name and location? And isn't there every indication that she
21 had actually seen the gun?

22 MS. SMYSER: Yes, your Honor. All of that is true and
23 that is what we believe distinguishes this case from many cases
24 cited by the defense and including the *Freeman* case. I think
25 that those indications that your Honor just cited show her

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1 basis for believing that Lucha had a gun and also show a
2 familiarity with him. They had been friends, she had seen the
3 gun before, and that shows where this information comes from
4 and that it is reliable. So I won't talk too much more about
5 the reliability of the 911 call unless your Honor has --

6 THE COURT: No. I think -- frankly, I am not yet
7 persuaded by the defense argument on that point. I think a
8 more interesting argument is the question of whether there is
9 reasonable suspicion when someone may be carrying the gun
10 lawfully but that is colored, very much, by *Bruen*, and this all
11 occurred before *Bruen*, as I understand it.

12 MS. SMYSER: That's correct, your Honor.

13 THE COURT: So it has to be looked at from the context
14 of what the law reasonably was held to be or appeared to be at
15 that time.

16 MS. SMYSER: That's correct, and that was something I
17 wanted to just touch briefly on, this question of whether the
18 gun possession in this instance is sufficient to show
19 reasonable suspicion that Lucha was engaging in ongoing
20 criminal activity, and obviously this --

21 THE COURT: Even though pre-*Bruen*, what is the basis
22 for saying that one has a reasonable suspicion that someone is
23 engaged in unlawful activity just based on knowing they are
24 carrying a gun?

25 MS. SMYSER: So, your Honor a few points on that.

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1 One, this 911 call was made around 10:00 p.m.
2 reporting gun possession on a sidewalk in the Bronx and the
3 standard here is reasonable suspicion to indicate that they are
4 engaging in some sort of crime, it is not probable cause, not
5 beyond a reasonable doubt, it is just to engage in that initial
6 investigatory stop. We see from case law that this falls well
7 within what rises to the level of reasonable suspicion. For
8 example, this is discussed in the *Gonzalez* case that we cite,
9 by Judge Engelmayer, in our briefing and he, in addition, cited
10 a few Second Circuit cases *Wiggan* and *Manuel* that I am happy to
11 provide the specific citations for in which 911 calls were made
12 reporting gun possession and then a subsequent stop was made.
13 Now, in those cases they also saw a bulge, which we have in our
14 case if an officer were to testify, but the point I am making
15 here is that the 911 call about gun possession was sufficient
16 in those cases to show that someone was engaging in some sort
17 of criminal activity based on the gun possession alone without
18 additional facts from how they were using the gun or anything
19 of that nature.

20 THE COURT: All right. Unless you had anything else
21 you wanted to cover, again unfortunately we are under a fairly
22 tight time frame today. I wanted to hear from your adversary
23 in response to the arguments you have just made.

24 MS. SMYSER: Of course.

25 MS. BAHARANYI: Thank you, your Honor.

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1 Briefly, question 1 or part 1 regarding the
2 reliability of this call, I think the issue is the exact
3 concern that was raised in *Florida v. J.L.*, which is what is to
4 stop someone from calling in some tip about someone they can
5 readily observe on the street in the community, claim that they
6 have a firearm, and setting off a chain of events to harass
7 that person. And I think if you keep that kind of concern in
8 the back of your mind, it highlights what our problem is here
9 in this type of case. The tip that was called in was by
10 someone who refused to provide her name and prior to police
11 actually stopping Lucha, refused to cooperate with them,
12 meaning they tried multiple times to reach back out to her, get
13 in contact with her, and she refused, which I think is one
14 signal that there is a concern that she might have done
15 something or been engaged in reporting someone that she knew
16 she should not have done. So there is that, that piece on the
17 reliability.

18 I think the second piece is in *Alabama v. White*, one
19 of the reasons why the Supreme Court found the tip there
20 reliable is because it provided some predictive information
21 that only someone familiar with the wrongful conduct or
22 intimately familiar with the wrongful conduct going on could
23 have known so that person gave the police a play-by-play of
24 where this individual -- White in this case -- was going to
25 pick up cocaine. Here there is no predictive information that

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1 is being provided and in fact, as we say in our motion, the 911
2 dispatcher explicitly asked the caller, do you know where he is
3 going? and she says no. So what we have here is someone who is
4 able to provide a very detailed description of someone that
5 they can see, maybe someone they have seen around the
6 community, but who in no way has provided information that
7 would suggest their tip is reliable in its assertion of
8 illegality, not just identifying him.

9 THE COURT: All right.

10 MS. BAHARANYI: And I also find that second issue
11 quite concerning, that someone could call and say, this person
12 has a firearm, in a state where individuals can legally carry
13 concealed weapons, and set off this motion of events allowing
14 police to stop and seize them. This caller, at no point, said
15 this person had a firearm and I am concerned, or he is
16 threatening people, or he is waiving it around. She didn't
17 even say that it has come out of his bag, it is simply a report
18 that he is in possession of a firearm which is not unlawful.
19 And, this case came after the *Heller* case, your Honor. So it
20 came after there has already been this shift from the Supreme
21 Court in what someone's rights to carry are. And I think the
22 fact that this is not a pre-*Heller* case but this is *Heller* on
23 our way to *Bruen* but understandably not there yet, I think
24 shows that the police had no reason at that point to suspect
25 that he was engaged in unlawful activity, unlawfully carrying a

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1 firearm. And if there had been some suggestion as there are in
2 the cases that there was threatening or assaultive or
3 concerning conduct in addition to it, then I think we would be
4 in a very different position but none of that was present here.

5 THE COURT: So, I will reserve on this as well and get
6 you a bottom line ruling but remind me, do we have a trial
7 date?

8 MS. BAHARANYI: We do not, your Honor.

9 THE COURT: Let's set a trial date. So I'm going to
10 get you bottom line rulings on both of these motions by what
11 did we say, early May? What was the date I just gave you? May
12 5th. And it is conceivable on the second motion that there
13 might be a need for an evidentiary hearing, but even if that is
14 true we would have it in a matter of a couple days. So, the
15 motions will all be done with by the middle of May. How long a
16 trial are we talking about?

17 MS. SMYSER: A week, your Honor.

18 THE COURT: So I don't have my trial schedule in front
19 of me, so my ever-ready courtroom deputy has just handed it to
20 me, and so we could do the last week of May. We could do the
21 middle of June. Let's stop there. How about either of those?

22 MS. BAHARANYI: Your Honor, if you are hearing
23 suggestions about trial date, I would ask for a date in
24 mid-June or early to mid-June if the Court is available June
25 5th through the week of June 12th. I will be out June 19th

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1 through the 30th but again available following that time.

2 THE COURT: So I think if we are going into June I
3 have a trial starting June 7th that will be over early the
4 following week, so let's look at Tuesday, June 13th.

5 THE DEPUTY CLERK: You are sitting in Portland.

6 THE COURT: Oh. I am sitting on the Ninth Circuit in
7 Portland. So how about June 20th?

8 MS. BAHARANYI: Your Honor, I am going to be out of
9 the country that week and the week of the 26th. I know the
10 Court mentioned end of May dates. I would be available that
11 time as well.

12 THE COURT: So how about -- I'm sorry, so in May? I
13 have a three-week trial starting May 1st so how about May 22nd?
14 Does that work?

15 MS. BAHARANYI: That time works for the defense.

16 MS. NICOLAS: It is fine for the government. I want
17 to clarify the timeline you set forth earlier. The defense
18 response for March 29th, I think your Honor originally said a
19 bottom line decision a week after that, which would be April
20 5th?

21 THE COURT: That's right. May 5th sounded wrong, that
22 is not my style. So I will decide these motions by April 5th,
23 giving everyone plenty of time to prepare for the trial, so
24 let's set it down for May 22nd.

25 All right? Very good.

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1 MS. BAHARANYI: Your Honor, before we adjourn, may I
2 have one moment?

3 THE COURT: Yes.

4 MS. BAHARANYI: I think there is something we may want
5 to address with the Court, if I could have one moment.

6 (Defendant and counsel conferring)

7 MS. BAHARANYI: Thank you, your Honor. Actually,
8 nothing further.

9 THE COURT: So you folks are excused except for
10 whoever with the government is remaining for the other matter,
11 and let's have the counsel and defendant of the co-defendant
12 set up right now.

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